90-1786

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT J. BROWN and
HENRY M. PRITCHETT,
Petitioners,
v.
THE CITY OF DORAVILLE, et. al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

WILLIAM J. MCKENNEY
Counsel of Record

DAVID M. KUPSKY
Two Midtown Plaza
Suite 1680
1349 West Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 881-1111
Of Counsel for Petitioners

May 17, 1991

Lex Publishing, 2161 Monroe Dr., Atlanta, GA 30324 (404) 875-5170

QUESTIONS PRESENTED

1. Whether a private conversation by off-duty police officers with a third person concerning police brutality and a promotion scheme measured by traffic ticket production, in the absence of evidence, impedes the ability of the government to deliver police services as a matter of law.

2. Whether the District Court improperly applied the balancing test established in *Pickering v. Board of Education*, 391 U.S. 563 (1968), in granting summary judgment to a municipal employer in action brought pursuant to 42 *U.S.C.* §1983, alleging that disciplinary measures violated public employees' right of free speech.

3. In the alternative, whether the District Court's decision, as affirmed by the Eleventh Circuit of Court of Appeals established a new two pronged First Amendment analysis, thereby omitting the previously required consideration of evidence of whether the protected speech impeded the delivery of governmental services.

LIST OF PARTIES

The parties to the proceedings below were the petitioners, Robert J. Brown and Henry M. Pritchett and the respondents, the City of Doraville, Doraville Mayor Gene Lively, Doraville Chief of Police George Everett and Doraville Assistant Chief of Police William F. Davis.

All of the parties below are parties to the proceedings in this Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioners, Robert J. Brown and Henry M. Pritchett, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on December 18, 1990 and denial of motion for rehearing entered on February 25, 1991.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals for the Eleventh Circuit was not published but has been reprinted in the appendix hereto, p. 16a, *infra*.

The decision of the United States District Court for the Northern District of Georgia, Atlanta, Division, was not published but has been reprinted in the appendix hereto, p. 2a, *infra*.

STATEMENT OF JURISDICTION

Invoking federal jurisdiction under 42 *U.S.C.* §1983, the petitioners brought suit in the United States District Court for the Northern District of Georgia, Atlanta Division. On May 14, 1990, respondents' motion for summary judgment was granted.

On December 18, 1990, the Court of Appeals for the Eleventh Circuit entered an order and judgment, *per curiam*, affirming the Northern District's grant of summary judgment. On February 25, 1991, the Court of Appeals for the Eleventh Circuit entered an order denying the petitioners' Motion for Rehearing.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 *U.S.C.* §1254 (1).

STATUTE INVOLVED

42 *U.S.C.* §1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of

Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioners, Robert J. Brown and Henry M. Pritchett are veteran police officers employed by the City of Doraville. Prior to being demoted to patrolmen on September 19, 1988, both men were supervisory officers holding the rank of sergeant and lieutenant respectively. The demotions resulted directly from petitioners' exercise of their freedom of speech when discussing allegations of a ticket quota system and police brutality in the City of Doraville Police Department.

On September 13, 1988, Sgt. Brown and Lt. Pritchett were standing in the parking lot of the Doraville City Hall, next to Sgt. Brown's car. Sgt. Brown had just finished testifying in his capacity as a police officer in a session of the Doraville Municipal Court and both officers were off-duty. They were engaged in a conversation between themselves about various matters including promotions within the police department, acts of brutality committed by certain Doraville police officers against citizens and the police department's policy of pressuring police officers to issue large numbers of traffic citations to generate revenues for the City and to reward said conduct with promotions and salary increases.

While the officers were conversing they were approached by James Watkins, an attorney, who serves as a part-time municipal court judge. Mr. Watkins commented to Sgt. Brown about one of the cases he heard earlier that evening and asked Sgt. Brown if he was upset due to the disposition of the case. Sgt. Brown responded

that he was not upset about the case. Mr. Watkins then inquired what Sgt. Brown may have been upset about and then involved himself in the ongoing conversation.

According to Mr. Watkins' account of the ensuing conversation, the officers expressed concerns about departmental promotions, undue emphasis to write traffic tickets to the exclusion of performing other police activities including patrolling residential areas and about incidents of police brutality against the public being inflicted by certain officers in the department. At the time of the conversation both officers considered Mr. Watkins to be a friend. The conversation lasted approximately ten minutes.

Due to his own concerns regarding the content of the conversation, in particular the existence of an incentive system for traffic citations, Mr. Watkins stated he would make a discrete inquiry. Neither Sgt. Brown nor Lt. Pritchett requested that Mr. Watkins take any action and, in fact, requested that he keep the conversation confidential.

The conversation concerned several recent personnel decisions, including promoting an individual from radio dispatch to patrol. As a supervisory level officer, Sgt. Brown was concerned about this promotion due to his perception that the individual was too immature to handle the responsibilities of a patrol officer. Sgt. Brown would have been this individual's immediate superior officer. Sgt. Brown testified to incidents of brutality on the part of an officer who had recently been promoted to supervisory level and that Sgt. Brown feared that such incidents would result in the City being liable

for civil damages. The conversation also included matters related to departmental morale, a traffic ticket revenue scheme which required officers to issue traffic citations to the exclusion of other police work and a lack of competitive bidding for work done for the City. Sgt. Brown testified that he and Lt. Pritchett were concerned for their safety on the street as well as the reputation of the police department in the community.

Petitioners do not deny that matters relating to the police department were discussed. The record is unclear as to whether the portion of the conversation regarding police department matters was initiated by Mr. Watkins or the petitioners. It is clear, however, that Sgt. Brown and Lt. Prichett did not seek out Mr. Watkins in reference to a request, grievance, order or complaint. This is significant as the petitioners were disciplined because their conversation with Mr. Watkins allegedly violated departmental General Order 86-02 (chain of command) prohibiting communications with elected officials and judges in connection with grievances, complaints or case dispositions. *See, infra.* p. 7.

Despite petitioners' desire to have the conversation remain confidential, on the following morning, Mr. Watkins related the substance of the previous evening's conversation to Doraville City Attorney Edward Carter. Mr. Watkins and Mr. Carter share private law office space.

The record reveals that Mr. Carter then telephoned Doraville Mayor Gene Lively to inform him that there was a problem with the police department that needed to be addressed. Mr. Carter told the Mayor that the

department's problem was that Mr. Watkins had been contacted by two officers with complaints about ticket quotas and promotions. The Mayor referred Mr. Carter to Police Commissioner Forrest Fleming.

Mr. Carter then telephoned Mr. Fleming informing him that two officers had complained to Mr. Watkins and that this was not the way people in their position should do things and that it was a serious departmental problem needing to be addressed. Despite conducting no investigation of the circumstances surrounding the conversation with Mr. Watkins or the truth of the matters discussed, City Attorney Carter recommended that the Police Commissioner take disciplinary action against the two officers.

Mr. Fleming conducted no investigation of the facts or truth of the matters discussed and did not discuss the conversation with Sgt. Brown or Lt. Pritchett. Mr. Fleming testified he generally calls an officer in to hear his side of the story prior to discipline but did not do so on this occasion.

Mr. Fleming telephoned Capt. William Davis several days later and explained the contents of the conversation as it had been related to him by Mr. Carter. Mr. Fleming told Capt. Davis he was concerned that a violation of the chain of command had occurred. In choosing to discipline the petitioners, Police Commissioner Fleming apparently ignored the substance of the petitioners' conversation and the fact that two superior officers were concerned with acts of brutality and a traffic citation quota system within the police department.

Capt. Davis also failed to conduct any internal investigation regarding the truth of the matters discussed during the conversation with Mr. Watkins nor did he discuss the matter with Sgt. Brown or Lt. Pritchett. Thereafter, in his capacity as acting Chief of Police, Capt. Davis determined that the conversation warranted disciplinary action.

After discussing the matter with Police Chief George Everett, Capt. Davis and Mr. Fleming ordered both police officers to appear at separate meetings where each officer was handed a memorandum recommending that he be demoted for violating departmental General Order 86-02 (chain of command). General Order 86-02 provides:

> The chain of command will apply to all matters of official business. At no time will any personnel contact any Elected Official in reference to any request or grievance without following the departmental chain of command.
>
> The general order relating to Chain of Command will also cover Judges of the Municipal Court of Doraville. No officer will contact them with a complaint or grievance regarding a case deposition without first following the Chain of Command. [Emphasis supplied].

At the meeting, Sgt. Brown was informed by Capt. Davis and Mr. Fleming that the alleged chain of command violation stemmed from the conversation with Mr. Watkins. Sgt. Brown inquired as to what he had done and was told by Mr. Fleming that he had no loyalty to the City and hurt Mayor Lively's feelings.

Lt. Pritchett was also informed by Capt. Davis and Mr. Fleming that the conversation which occurred between Sgt. Brown and Mr. Watkins had hurt the Mayor's feelings. *Moreover, Mr. Fleming told Lt. Pritchett that loyalty was more important than such things as brutality and that he could put up with somebody "whipping somebody" easier than he could put up with somebody who was not loyal.*

As a result of the off-duty private conversation Sgt. Brown and Lt. Pritchett had with Mr. Watkins, both officers were immediately demoted from their supervisory positions to the rank of patrolmen. The demotions resulted in reductions in pay and benefits.

Petitioners' complaint, under 42 *U.S.C.* §1983, alleged deprivations of constitutional rights of due process and freedom of speech. Petitioners alleged that they were demoted from their positions as supervisory officers with the City of Doraville Police Department as a direct result of the off-duty private conversation with an individual who serves as an appointed, part-time municipal court judge. It was further alleged that the demotions were motivated by the City's desire to silence and cover-up issues of public concern to the citizens of the City of Doraville.

After extensive discovery, the respondents filed a motion for summary judgment which the District Court granted. As to the claims for First Amendment violations, the trial court determined that although the speech at issue involved matters of public concern, the balance between the petitioners' interest in freedom of speech and of the City's interest in discipline weighed in

favor of the City. Petitioners contend that the district court erred in striking the balance against their First Amendment rights and in granting summary judgment to the City on the First Amendment claims.

On *de novo* review in the Eleventh Circuit Court of Appeals, the petitioners argued primarily that the record below failed to contain any evidence that the private conversation with Mr. Watkins impeded or had the potential to impede the delivery of police services. The petitioners argued that in the absence of such evidence, the trial court erred in its application of the balancing test articulated in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and striking the balance in favor of the City. The petitioners contend that, as a matter of law, where no evidence of any actual or potential impact on the delivery of police services is introduced by the defense, summary judgement is not appropriate.

The Eleventh Circuit affirmed the decision holding that the record supported the balancing done and the findings of the trial court. The Eleventh Circuit also denied petitioners' Motion for Rehearing and Suggestion of Rehearing En Banc.

Petitioners contend that, in light of the absence of any evidence that the protected speech impeded or had the potential to impede the delivery of police services, the Eleventh Circuit decision affirming the trial court's order in all respects, is in direct conflict with or has modified prior decisions of the United States Supreme Court and the Eleventh Circuit Court of Appeals.

Petitioners contend that the balancing test set forth *Pickering v. Board of Education*, 391 U.S. 563 (1968) and

Rankin v. McPherson, 483 U.S. 378 (1987) and applied in *Bryson v. City of Waycross*, 888 F.2d 1562 (11th Cir. 1989); *Eiland v. City of Montgomery*, 797 F.2d 953 (11th Cir. 1986) and *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982) has now been modified to eliminate the requirement that the governmental employer demonstrate that the protected speech impeded or had the potential to impede the delivery of governmental services. Accordingly, under the construction given *Pickering* by the trial court and the Eleventh Circuit in this case, a governmental employer is entitled to summary judgment, as a matter of law, in First Amendment employment cases without being required to show any evidence that the protected speech impeded or had the reasonable likelihood to impede the delivery of services. The Eleventh Circuit has effectively eliminated one of the essential three prongs of the *Pickering* balancing test.

REASONS FOR GRANTING THE WRIT

IN THE ABSENCE OF EVIDENCE THAT THE PROTECTED SPEECH IMPEDED THE CITY'S ABILITY TO DELIVER POLICE SERVICES, AS A MATTER OF LAW, SUMMARY JUDGMENT WAS NOT APPROPRIATE.

In considering the motion for summary judgment, the district court preliminarily ruled that the petitioner's speech involved a mix of matters both related and unrelated to public concerns. Accordingly, the district court considered all of petitioners' speech as protected by the First Amendment. *See, Kurtz v. Vickery*, 855 F.2d 723 (11th Cir. 1989). The district court then proceeded to apply the *Pickering* balancing test.

Pickering requires that three factors be considered in balancing the government's interests against an employee's right to free speech: 1) whether the speech at issue impedes the government's ability to perform its duties efficiently; 2) the manner, time and place of the speech; and 3) the context within which the speech was made. *See, Morales v. Stierheim*, 848 F. 2d. 1145 (11th Cir. 1988), *cert. denied sub nom., Leon v. Avino*, ____U.S.____, 109 S.Ct. 1124 (1989).

The district court found that the context, manner, time and place of the speech were reasonable and therefore, the second and third steps of the *Pickering* test weighed in petitioners' favor. However, when considering the first factor in the *Pickering* test, i.e., whether the speech impeded the government's ability to perform its duties effectively, the district court held that the speech in question "could have a detrimental effect on the department" in that it brought into question "superiors' decision making" which "could undermine their authority and affect morale." The trial court concluded that in the balance the City's interest in efficient operation of its police department outweighed petitioners' right to free speech or exposure of police brutality.

The only evidence relied upon by the district court to support this finding was the deposition testimony of Police Commissioner Forest Fleming which is devoid of any evidence that the speech would have a detrimental effect on the operation of the police department. A review of the deposition reveals that Mr. Fleming's testimony contains nothing more than his personal opinion that Sgt. Brown may have discussed "his

thoughts" with other patrolmen on a previous occasion and that Sgt. Brown had written a letter some two years prior to his demotion. Obviously, neither of these two prior events was related to the private conversation with Mr. Watkins for which the petitioners were demoted. Moreover, Mr. Fleming's opinion is simply not evidence tending to show that petitioners' speech had any impact much less an adverse impact on the police department or the delivery of police services.

Aside from Mr. Fleming's testimony, no other affidavits, testimony or evidence was offered by the defense that the conversation with Mr. Watkins impeded or had the potential to impede the delivery of police services. Petitioners contend no such evidence could have been offered by the defense as none existed. There is no evidence that petitioners communicated the contents of the private speech to anyone else. Aside from Mr. Watkins' discussion with Mr. Carter, the content of the subject speech was not disseminated to anyone else. Thus, it is inconceivable that the private conversation could have had any impact at all on the Doraville Police Department.

The complete lack of evidence is reflected in the court's order granting summary judgment which specifically states that there exists no direct evidence that the statements at issue had any impact. The district court indicated that the only impact was the "Defendants' perception" of disloyalty and of a threat to discipline. Clearly the record did not support the district court's conclusion that the conversation with Mr. Watkins actually impeded or had the potential to impede the efficient delivery of police services.

The district court's analysis altered the *Pickering* test by amputating one of its three prongs. The result of eliminating the "impediment prong" from the *Pickering* test is that all subsequent First Amendment cases arising in the Northern District of Georgia will be decided contrary to the test announced by this Court in *Pickering*.

In this case, the district court recognized there was no unequivocal evidence that the speech had any impact, let alone a disruptive impact, on the police department. In order to meet their burden on summary judgment, the defendants were required to show more than rank speculation and unsupported conjecture. Petitioners submit that given the absence of evidence, the perception of one witness of disloyalty, based upon events, unrelated to the speech in issue, can not satisfy the defense burden on summary judgment.

The sole issue considered on appeal to the Eleventh Circuit was whether the district court erred in striking the balance in favor of the governmental employer where the record was devoid of evidence that the speech at issue impeded the City's ability to perform its police duties efficiently. Upon *de novo* review of the record, the Eleventh Circuit found that the record supported the district court decision.

Petitioners submit that as a result of affirming the district court, the Eleventh Circuit has adopted the district court's truncated version of the *Pickering* analysis. Thus in the Eleventh Circuit, a governmental employer is now entitled to summary judgment as a matter of law in an action arising from a decision to discipline a police officer for exercising his right to free speech, privately and off-

duty, even where the employer has made no evidentiary showing that the speech could reasonably impede the ability of the police department to deliver services.

This construction of *Pickering* is in direct conflict with *Rankin v. McPherson*, 483 U.S. 378 (1987); *Bryson v. City of Waycross*, 888 F.2d 1562 (11th Cir. 1989); *Eiland v. City of Montgomery*, 797 F.2d 953 (11th Cir. 1986) and *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982). These decisions of the United States Supreme Court and the Eleventh Circuit Court of Appeals, whether decided favorably or unfavorably to the employee, all provide a correct statement and application of the *Pickering* test and the analysis required thereby. A review of the courts' treatment of the evidence of actual or potential disruption of police services resulting from the speech at issue in the aforementioned cited opinions reveal the obvious error in the instant case.

In *Rankin*, a deputy constable commented to a fellow employee after hearing of an assassination attempt on the President, "If they go after him again, I hope they get him." The deputy was discharged. On two occasions, the district court granted summary judgment to the governmental employer as to McPherson's First Amendment claim on the basis that the speech was not protected. On both appeals, the Fifth Circuit Court of Appeals reversed. Certiorari was granted after the second reversal.

This Honorable Court affirmed. The majority recognized that in accordance with *Pickering* and *Connick v. Myers*, 461 U.S. 138 (1983), the employer bore the burden of justifying the discharge on grounds which did

not violate the employee's First Amendment rights. The majority held that in the complete absence of evidence that the speech interfered with the functioning of the constable's office, the employer failed to meet that burden and the deputy's speech was to be protected. *Rankin*, 483 U.S. at p. 378.

As in *Rankin*, the employer in the present case produced no evidence that the conversation at issue interfered or was likely to interfere with the functioning of the Doraville Police Department. As in *Rankin*, the employer failed to carry its burden and should not have prevailed on summary judgment. The decisions of the district court and the Eleventh Circuit in this case clearly deviated from the analysis used in *Rankin*.

The *Bryson*, *Eiland* and *Waters* cases demonstrate that the district court and the Eleventh Circuit also deviated from the precedents in the leading cases in the Eleventh Circuit with respect to the employer's burden to show that the speech did or reasonably could have interfered with delivery of police services.

In *Bryson*, the trial court's determination that speech uttered by a demoted police officer was not protected was affirmed. On *de novo* review, the Eleventh Circuit outlined the evidence relating to the likelihood that the speech would interfere with the delivery of police services. The record showed that Bryson bitterly complained to all who would listen in the police department and that officers avoided the police station because of Bryson's animosity toward the chief. There was also direct testimony from several witnesses that Bryson's

conduct caused substantial interference with police operations.

In contrast to *Bryson*, there was absolutely no such evidence in the petitioners' case. There was no evidence of bitter complaints by petitioners, no evidence of any impact on other officers and absolutely no evidence of any disruption of police operations. Moreover, the conversation for which petitioners were demoted took place essentially between themselves and only involved a third party when Mr. Watkins took the steps to get involved in the conversation. Moreover, it was Mr. Watkins, for reasons known only to him, and not petitioners who communicated the content of the conversation.

In *Waters*, the police officer was disciplined for making disparaging remarks about the chief of police to another officer while off-duty and in a bar. Officer Waters was demoted for insubordination after the second officer, whom Waters considered a friend, filed a report describing the incident. Upon bench trial, the district ruled that the remarks were not protected speech and did not infringe on Waters First Amendment rights.

On appeal, the Eleventh Circuit considered the employer's general assertions that Waters' remarks could harm the close working relationship of the department and undermine morale. The Eleventh Circuit reversed finding that generalized concerns for morale and working relationships were not a sufficient showing of a reasonable likelihood of adverse harm to the department, its efficiency, discipline or harmony.

Similarly in *Eiland,* a police officer was demoted for typing and authoring a part of a poem critical of the mayor. The poem was typed in the police department and posted on bulletin boards in the department.

In reversing a judgment upon a jury verdict for the employer, the Eleventh Circuit focused on the evidence of the potential disruption factor in the *Pickering* test. The court reviewed the evidence and concluded that although some witnesses expressed concern over the need for discipline and respect within the department, the evidence was almost uniformly based upon assumption and speculation and that there was no affirmative evidence of adverse effects from the poem. The court recognized that an employer need not allow events to deteriorate to the point of actual disruption before acting. However, the court also noted that the need for discipline as an *abstract concern* should not be allowed to overshadow individual interests in free speech. *Id.* at 959.

As in *Eiland,* there was no evidence in this case warranting the trial court's conclusion that the speech impeded the ability of the police department to perform its governmental function. Clearly, in absence of any real evidence of actual or potential disruption to police services the *Pickering* analysis requires a finding in favor of the disciplined employee.

CONCLUSION

A private off-duty conversation regarding issues of public concern does not as a matter of law impede the ability of a police department to provide police services. In the absence of any evidence that the conversation

actually impeded or was reasonably likely to impede the delivery of police services, the *Pickering* balancing test requires that summary judgment not be granted for the employer. By affirming the district court, the Eleventh Circuit Court of Appeals has modified the *Pickering* test to a two prong standard. This decision will have a far reaching impact on all future free speech cases arising within the Northern District of Georgia and should be reviewed on certiorari.

Furthermore, the decision has a freezing effect on law enforcement officers who wish to come forward with evidence of brutality by fellow officers or municipal corruption. The present decision reinforces the code of silence and provides the municipal employer with both a sword and a shield for use in future litigation. Police officers should be encouraged by their employers to come forward with evidence of illegal conduct by fellow officers and should be free of threats of demotion for exercising their free speech rights. Therefore, it is respectfully requested that the Writ of Certiorari be granted.

This 17th day of May, 1991.

Respectfully submitted by:
McKENNEY & FROELICH

WILLIAM J. McKENNEY
Counsel of Record for Petitioners

DAVID M. KUPSKY
Of Counsel to Petitioners

Two Midtown Plaza
Suite 1680
1349 West Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 881-1111

APPENDIX OF PETITIONERS

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROBERT J. BROWN and :
HENRY M. PRITCHETT :

vs. CIVIL NO. 1:89-cv-189-ODE

THE CITY OF DORAVILLE, :
GENE LIVELY, Individually, :
and as Mayor of the City of :
Doraville, GEORGE EVERETT, :
Individually, and as Chief of :
Police of the City of Doraville, :
WILLIAM F. DAVIS, :
Individually, and as Captain :
of the City of Doraville :
Police Department :

ORDER

This civil rights action is before the court on Defendants' motions to extend time to file motion for summary judgment and for summary judgment. Plaintiffs move to strike Defendants' motion for summary judgment and their reply brief.

This action arose after Plaintiffs, who work for the Doraville, Georgia police department, were demoted to the rank of patrolmen, effective September 10, 1988.[1] The alleged reason for their demotions was a violation of general order 86-02, which covers the chain of command

[1]Plaintiff Brown was demoted from the rank of sergeant; Plaintiff Pritchett from the rank of lieutenant.

in relation to personnel grievances.[2] It specifically prohibits personnel from contacting any elected official with regard to any request or grievance without first informing their superiors in the police department.

The purported violation of the chain of command rule arose from a conversation in a parking lot between Plaintiffs and a municipal court judge after court on September 13, 1988, while Plaintiffs were off duty. At his deposition, Plaintiff Brown testified that just prior to the conversation at issue, he and Plaintiff Pritchett were criticizing some promotions made that day by their superiors. Plaintiff Brown stated that they "were a little ill and were blowing off some steam." He indicated that the judge "was drawn into the conversation by that" as he left the courthouse and passed them. Plaintiffs both testified that the conversation then continued in the same vein in the presence of the judge.

Specifically, Plaintiff Brown testified that he told the judge that he was upset over the promotions. He stated that he probably named at least two individuals whose promotions he felt were a mistake. He testified that told

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[2]General order 86-02, dated November 1, 1986, states:

The phrase "CHAIN OF COMMAND" is defined as: The orderly passing on of orders, complaints, requests and discipline from all personnel.

The CHAIN OF COMMAND will apply to all matters of official business. At no time will any personnel contact any *Elected Official* in reference to a request or grievance without following the departmental chain of command.

The General Order relating to CHAIN OF COMMAND will also cover Judges of the Municipal Court of Doraville.

No officer will contact them with a complaint or grievance regarding a case disposition without first following the CHAIN OF COMMAND....

the judge why he was upset. His testimony indicates that the reasons he disagreed with the promotions were because one individual, who was promoted from a radio position to a patrol officer, was immature. At his deposition, he also stated that he discussed the promotion of a female officer, who he felt lacked supervisory and decisionmaking abilities and was not punctual; he stated that he felt she was promoted because of her sex. Plaintiff Brown also testified that he told the judge the reasons he was upset over a third promotion. The reasons he stated were that the officer was promoted because of his ticket writing and he was concerned because earlier, the officer had punched an arrestee in the mouth. Plaintiff Brown also testified that he probably mentioned his concern about some maintenance work done on city property, a fence built at a local park and grass purchased that were done without bids. He was unsure about whether he simply expressed his concerns over things being done without bids, or discussed the above mentioned details specifically.

Plaintiff Pritchett testified that they also discussed the department's emphasis on ticket production at the expense of patrols of the residential and business districts and concern about job security. He also stated they discussed the inexperience of one officer who was promoted, his concern regarding the reluctance of the female officer in responding to calls and that a third officer was promoted for his ticket production.

At his deposition, Plaintiff Brown indicated that he spoke to the judge as a friend, not as a public official and he asked the judge to keep the conversation confidential. Plaintiff Brown stated that it was not his intention that

the conversation, which lasted fifteen or twenty minutes, be made public.

The judge stated at his deposition, when asked about the conversation at issue, that Plaintiffs

> were upset about some promotions that had just been announced that day...they were angry... They were concerned about one or two officers, who I don't think they felt should have been promoted. They were concerned about the ticket situation. They felt that too much emphasis was being placed on the number of tickets that were being written as opposed to the policing that was being done.

The judge also said that they were concerned about the overzealousness of some officers in handling arrests. The judge stated that when the conversation was over, he told Plaintiffs he would make a discrete inquiry about these matters the next morning.

Subsequently, the judge asked the city attorney about these issues. According to the judge's deposition testimony, on hearing the substance of the complaints, the city attorney immediately identified Plaintiffs as the speakers and contacted several other city officials, including Defendant Lively, the mayor, and Defendant Fleming, the police commissioner.[3]

After learning of the conversation at issue, Defendant Davis, the acting chief of police, allegedly determined that disciplinary action was appropriate. He and Defendant

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[3] The record indicates that at least one of the Plaintiffs had expressed these concerns to various Doraville officials before.

Fleming subsequently discussed the matter with Defendant Everett, the police chief, who was hospitalized. The men allegedly agreed that Plaintiffs should be demoted.

On September 15, 1988, Defendants Davis and Fleming met with each Plaintiff and presented them a memorandum which they and Defendant Everett had signed, recommending their demotion for violating the chain of command rule with regard to their conversation with the judge. Plaintiffs allege that they were told by Defendant Fleming that they had no loyalty and had hurt the mayor's feelings.

Plaintiffs claim that the demotion violated their first amendment rights, in that the conversation touched on matters of public concern. They assert that general order 86-02 is unconstitutionally vague and overbroad as applied and that they did not violate it because the judge contacted them and the conversation occurred while they were off duty. Plaintiffs also assert that Defendants demoted them without due process of law. Plaintiffs further allege that the police department's practice of concentrating its officers' efforts in traffic related duties is potentially dangerous to the community.

Plaintiffs seek reinstatement to their former ranks and recovery of all accrued salary and benefits they would have received absent the demotion. In addition, they seek compensatory and punitive damages, costs and fees.

Defendants move for summary judgment,[4] asserting that Plaintiffs are at will employees who have no property interest in their positions. Thus, according to Defendants, both Plaintiffs' procedural due process claims and the substantive due process claims relating to general order 86-02, must fail. Defendants further argue that in this circuit a valid substantive due process claim must allege facts so egregious that they shock the conscience. They maintain that no such evidence exists in this case. Defendants further contend that the city has a compelling interest maintaining order and discipline in the police departments which is promoted by the general order.

In addition, Defendants assert that they are entitled to qualified immunity because no reasonable official would have known that their actions violated clearly established law in light of the city charter's authorization that they could fire, hire and supervise city employees.

As to Plaintiffs' first amendment claims, Defendants maintain that the speech at issue addressed personnel matters and did not touch on matters of public concern. Defendants cite Plaintiffs' own testimony as evidence. Defendants further argue that even if Plaintiffs' speech touched on matters of public concern and was therefore covered by the first amendment, their demotions were justified absent the protected speech. Defendants assert that, as stated in the demotion memo, Plaintiff Pritchett failed to properly perform supervisory duties and Plaintiff

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[4] Defendants' motion for an extension of time in which to file this motion is GRANTED. Justice and judicial economy will be better served by reaching the merits of Defendants' motion. For the same reason, Plaintiffs' motions to strike Defendants' motion for summary judgment and their reply brief on timeliness grounds are DENIED.

Brown had previously violated the chain of command order by surreptitiously sending several officials, including Defendant Lively, the mayor, a letter criticizing the way the police deparment was being run. Defendants further state that even if Plaintiff's speech was protected, the compelling governmental interest in the organized, disciplined and orderly operation of the police department outweighs Plaintiff's interest in speaking out on these matters.

In response, Plaintiffs argue that their conversation with the judge addressed matters of legitimate public concern, thus triggering first amendment protection. These matters included the pressure being placed on patrol officers to issue traffic citations, rather than protecting homes and businesses and the department's promotion policy, which purportedly was based on the amount of revenue generated through traffic citations. In support of this contention, Plaintiffs present testimony from several of their fellow officers asserting that they were pressured to issue traffic citations, the production of which would be rewarded by salary increases and promotions. Plaintiffs state that using traffic law enforcement to raise revenue violates O.C.G.A. §40-6-9(b). Plaintiffs further maintain that their speech in no way impeded police functions, thus their first amendment interest outweigh any of Defendants' interests in maintaining departmental discipline and loyalty.

As to the due process claim, Plaintiffs maintain that general order 86-02 only prohibits officers from complaining to judges about the disposition of cases. They argue that they did not violate the chain of command rule because their speech did not involve the disposition of a

case. Plaintiffs assert that they possess a legitimate claim of entitlement to be free from adverse personnel action pursuant to the rule when their actions did not violate it. They maintain that Defendants' application of the rule denied them substantive due process.

Plaintiffs further argue that Defendants are not entitled to qualified immunity, because the chain of command rule was not violated. They also assert that the contours of their first amendment rights under these circumstances are sufficiently well established that a reasonable person in Defendants' position should have known that the demotions were unconstitutional.

Summary judgment is appropriate only if the evidence reveals the absence of any genuine issues of material fact and shows that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The evidence must be viewed in the light most favorable to the nonmovant. *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 157 (1970).

In order for the first amendment claim to survive Defendants' motion, Plaintiffs must establish that they were engaged in a protected activity. *Connick v. Myers*, 461 U.S. 138, 147 (1983). In this context, for speech to be protected, it must touch on "a matter of legitimate public concern upon which free and open debate is vital to informed decision making by the electorate." *Id.* at 145 (quoting *Pickering v. Board of Education*, 391 U.S. 563, 571-72 (1968)). Whether such speech addresses a matter of public concern must be determined by its "content, form and context...as revealed by the entire record." *Id.* If this threshold requirement is met, then the court must

examine the evidence and weigh the employee's interest in speaking out on a matter of public concern against the employer's interest in maintaining an efficient and productive workplace. *Id.* at 140.

The evidence presented indicates that the content of the speech at issue primarily concerned Plaintiffs' philosophical differences with their superiors over the appropriateness of promotions and the connection between promotions and traffic citation production. Its form and context, in a casual conversation following several promotions with which Plaintiffs did not agree, supports the conclusion that the speech was an expression of personal dissatisfaction over personnel decisions.

The court is of the opinion that for most part, Plaintiffs were speaking out as employees on matters of personal interest relating to personnel assignments and promotion criteria, not on matters of public concern. The alleged aggressiveness of one officer who received a promotion might arguably address a matter of public concern. However, the context in which this was raised is so intimately connected with the criticisms over promotions, that in this situation it does not rise to the level of constitutionally protected speech.

Yet, "the meaning of the term 'public concern' is not without ambiguity." *Kurtz v. Vickrey*, 855 F.2d 723, 726 (11th Cir. 1989). The unavailability of patrolmen to respond to calls because of their assignment in radar units and Plaintiff Brown's testimony regarding the absence of bidding on certain municipal projects are issues of more than personal interest. Therefore, since some of Plaintiffs' speech arguably addresses matters of public concern, the

court will proceed to the next step required in a first amendment analysis, the weighing of the parties' interests. Because Plaintiffs' speech is "mixed," in that some of it may relate to matters of public concern and some does not, it will all be treated as protected for the purposes of this analysis. *Kurtz*, 855 F.2d at 733.

The first amendment balancing test "is not performed in a vacuum." *Bryson v. City of Waycross*, 888 F.2d 1562, 1567 (11th Cir. 1989). The court may consider the circumstances surrounding a personnel decision. *Id.* Moreover, the government's burden in justifying its action "varies depending on the nature of the employee's expression." *Connick* at 150.

In its analysis, among the things the court must consider are "(1) whether the speech at issue impedes the government's ability to perform its duties efficiently, (2) the manner, time and place of the speech, and (3) the context within which the speech was made." *Bryson v. City of Waycross*, 888 F.2d 1562, 1567 (11th Cir. 1989).

On the issue of to whether Plaintiffs' impeded the government's efficiency, the court must examine "whether the statement impairs discipline by superiors or harmony among co-workers, [or] has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary." *Id.* (quoting *Rankin v. McPherson*, 483 U.S. 378, 388 (1987)).

In this case, Plaintiffs' speech could have a detrimental impact on the department, in that it brought Plaintiffs' superiors' decisionmaking abilities into question, which could undermine their authority and affect morale. It could also affect the co-workers who

received the promotions. Moreover, the statements were made about individuals with whom Plaintiffs worked closely. *Pickering*, 391 U.S. at 572. Defendant Fleming testified that in his discussion with Defendant Davis and Everett regarding the decision to demote Plaintiffs he cited Plaintiffs' disloyalty to the department as superior officers. He characterized Plaintiff Brown as an instigator of a morale problem by criticizing promotions and not accepting the city's decision, which he defined as disloyalty. Admittedly, there is no direct evidence that the statements at issue here had any impact, other than Defendants' perception of disloyalty and the threat to discipline by Plaintiffs' alleged violation of the chain of command. However, it is not necessary "for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick* at 152.

Basically, the time, place and manner of the speech weighs in Plaintiffs' favor. They were off duty, outside the department and the statements were made in what they considered to be a private conversation. However in continuing the conversation in the presence of the judge, Plaintiffs violated the spirit, if not the strictly construed letter of the chain of command rule, which strengthens Defendants' position. *See Connick* at 153 n. 14.

As to the context in which the speech was made, this is not a case where employees, out of their disinterested civic concern, discussed the city's emphasis on ticket

production and municipal bidding[5] with an official. It was no coincidence that the conversation at issue occurred on the heels of several promotions. Moreover, Defendant Fleming testified that Plaintiffs had been complaining about morale and their dissatisfaction with policies set by their superiors over many months and that Plaintiff Brown "was creating...[morale] problems by discussing his thoughts with all the patrolmen, making people choose sides." Lieutenant Davis also testified that Plaintiffs "always did gripe a lot."[6]

Connick held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of only personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.* at 147. The evidence is uncontroverted that the promotions were the conversation's focus. It touched matters of public concern only in the most limited sense. The speech at issue is most fairly characterized as an expression of employee dissatisfaction with office policy. The limited first amendment interest involved in this case did not require Defendants to tolerate what they viewed as a

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[5] When Plaintiffs and the judge were asked on deposition what was said outside the courthouse, only Plaintiff Brown recalled mentioning the bidding issue.

[6] In addition, several years earlier, Plaintiff Brown sent a five page letter to the mayor, the police chief and Defendant Davis criticizing personnel decisions, including a decision involving one of the individuals Plaintiff later discussed with the judge. The letter indicated that he discussed the propriety of this individual's promotion with others in the department.

violation of the chain of command rule and behavior undermining their authority.[7]

The court turns to the substantive due process issue.[8] Even if Plaintiffs did not violate the rule, their substantive due process claim cannot survive Defendants' motion.

Substantive due process is violated only when the government's actions "'shocks the conscience' or constitutes force that is so 'brutal' as to 'offend even hardened sensibilities.'" *Faucher v. Rodziewicz*, 891 F.2d 864, 871 (11th Cir. 1990) (quoting *Rochin v. California*, 342 U.S. 165, 172-173 (1952)). The application of the chain of command rule in this case does to constitute such an action.

Because Defendants did not violate Plaintiffs' constitutional rights, the court need not reach the issue of qualified immunity.

Accordingly, defendants' motion for an extension of time in which to file a motion for summary judgment is GRANTED. Plaintiffs' motions to strike Defendants' motion for summary judgment and their reply brief are

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[7] Under these circumstances, where the chain of command rule does not regulate speech in a public forum and does not prohibit speech to elected officials, but only channels its direction, and where Defendants have asserted a compelling interest in the orderly and effective operation of the police department, the court likewise cannot say that general order 86-02 violates the first amendment. *See Jones v. Heyman*, 888 F.2d 1328 (11th Cir. 1989).

[8] Because Plaintiffs do not address the procedural due process issue in their response and it appears that they were at will employees, the court assumes Plaintiffs do not contest that aspect of Defendants' motion.

DENIED. Defendants' motion for summary judgment is GRANTED.

SO ORDERED, this 14 day of May, 1990.

ORINDA D. EVANS

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-8566

D. C. Docket No. 1:89-cv-189-ODE

ROBERT J. BROWN and

HENRY M. PRITCHETT

Plaintiffs-Appellants,

versus

CITY OF DORAVILLE, The City of Doraville; GENE LIVELY, Individually and as Mayor of the City of Doraville; GEORGE EVERETT, Individually, and as Chief of Police of the City of Doraville, and WILLIAM F. DAVIS, Individually, and as Captain of the City of Doraville Police Department,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

(December 18, 1990)

Before FAY, ANDERSON and MARKEY*, Circuit Judges.

PER CURIAM:

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* Honorable Howard T. Markey, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

The sole issue presented in this appeal is the correctness of the balancing done in accord with Pickering v. Board of Education, 391 U.S. 563 (1968). We find the record fully supports the conclusions of the district court as set forth in its Order of May 14, 1990.

The judgment is AFFIRMED.

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-8566

ROBERT J. BROWN and HENRY M. PRITCHETT

versus

CITY OF DORAVILLE, The City of Doraville; GENE LIVELY, Individually and as Mayor of the City of Doraville; GEORGE EVERETT, Individually, and as Chief of Police of the City of Doraville, and WILLIAM F. DAVIS, Individually, and as Captain of the City of Doraville Police Department,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion December 18, 1990, 11th Cir., 19__, ____F.2d____).

Before: FAY, ANDERSON and MARKEY*, Circuit Judges.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

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* Honorable Howard T. Markey, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42
(9/90)

United States Court of Appeals

For the Eleventh Circuit

No. 90-8566

D.C. Docket No. 1:89-cv-189-ODE

ROBERT J. BROWN and
HENRY M. PRITCHETT

Plaintiffs-Appellants,

versus

CITY OF DORAVILLE, The City of Doraville; GENE LIVELY, Individually and as Mayor of the City of Doraville; GEORGE EVERETT, Individually, and as Chief of Police of the City of Doraville, and WILLIAM F. DAVIS, Individually, and as Captain of the City of Doraville Police Department,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

Before FAY, ANDERSON and MARKEY*, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

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* Honorable Howard T. Markey, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court..

Entered: December 18, 1990

For the Court: Miguel J. Cortez, Clerk

By: David Maland
Deputy Clerk

ISSUED AS MANDATE: MAR 6 1991